



Kyle T. D'Agostino :  
v. : A.A. No. 11 - 123  
Department of Labor & Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** In this case Mr. Kyle D'Agostino urges that the Board of Review of the Department of Labor & Training erred when it affirmed a referee's decision to dismiss Mr. D'Agostino's appeal from the Department's decision denying him unemployment benefits because it was filed late. Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Because I conclude that the Board's decision is supported by substantial evidence of record and is not otherwise affected by error of law, I must recommend that the decision of the Board of Review affirming the dismissal of his appeal be affirmed.

## **FACTS & TRAVEL OF THE CASE**

The facts and travel of the case may be briefly stated: Mr. D'Agostino was receiving unemployment benefits when he applied for Temporary Disability Insurance (TDI) benefits on December 30, 2009. Confronted with this claim, which indicated he was physically unable to work, the Director — on February 5, 2010 — issued a decision denying benefits to Mr. D'Agostino, finding him disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-12, which bars benefits to those persons who are not available for full-time work.

Claimant's appeal was not received by the Board of Review (for assignment to a referee) for over a year — on March 15, 2011. After conducting a hearing on May 13, 2011, Referee Patrick Carroll issued a decision in which he dismissed claimant's appeal because it had been filed long after the expiration of the 15-day appeal period found in Gen. Laws 1956 § 28-44-39(b).

In his May 23, 2011 decision, the referee made the following findings of fact:

The claimant provided credible testimony that he received the decision of the Director but offered no good cause as to why he did not appeal that decision on time.

Referee's Decision, May 23, 2011, at 1. Based on these findings, the referee made the following conclusions:

\* \* \*

The 15-day appeal period provided for under the provisions of Section 28-44-39(b) can be extended if the individual who filed out

of time had good cause for being late.

[Quotation from Gen. Laws 1956 § 28-44-39(b)]

The claimant offered no good cause as to why the decision dated February 5, 2010 was not appealed until March 15, 2011. His request for late appeal is not granted at this time.

Referee's Decision, May 23, 2011, at 2. Accordingly, the claimant's appeal was dismissed.

Claimant sought review of this decision and on August 18, 2011 a majority of the members of the Board of Review issued a brief decision affirming the referee's dismissal of claimant's appeal and adopting the Decision of the Referee as its own. The Member Representing Labor dissented — indicating that he would allow an appeal on the repayment issue. Thereafter, on September 16, 2011, claimant filed a timely pro-se complaint for judicial review in the Sixth Division District Court.

### **STANDARD OF REVIEW**

The standard of review is provided by R.I. Gen. Laws § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

#### **42-35-15. Judicial review of contested cases.**

\* \* \*

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “\* \* \* may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’”<sup>1</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>2</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>3</sup>

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of the Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

\* \* \* eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

2 Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

3 Cahoone v. Bd. of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). Also D'Ambra v. Bd. of Review, Dept of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

### **APPLICABLE LAW**

The time limit for appeals from decisions of the Director is set by Gen.

Laws 1956 subsection 28-44-39(b), which provides

(b) Unless the claimant or any other interested party who is entitled to notice requests a hearing within fifteen (15) days after the notice of determination has been mailed by the director to the last known address of the claimant and of any other interested party, the determination shall be final. For good cause shown the fifteen (15) day period may be extended. The director, on his or her own motion, may at any time within one year from the date of the determination set forth in subdivision (a)(1) of this section reconsider the determination, if he or she finds that an error has occurred in connection with it, or that the determination was made as a result of a mistake, or the nondisclosure or misrepresentation of a material fact.

(Emphasis added)

Note that while subsection 39(b) includes a provision allowing the 15-day period to be extended (presumably by timely request), it does not specifically indicate that late appeals can be accepted, even for good cause. However, in many cases the Board of Review (or, upon review, the District Court) has permitted late appeals if good cause was shown.

## ANALYSIS

The purpose of all tribunals — whether judicial or administrative — is to adjudicate cases on the merits. However, procedural parameters have to be established to avoid anarchy. The time limit for appeals from decisions of the Director to the Referee level is set in Gen. Laws 1956 § 28-44-39(b) to be 15 days. Accordingly, the issue in the case is whether the decision of the Referee (adopted by the Board of Review) that claimant had not shown good cause for his late appeal is supported by substantial evidence of record or whether it was clearly erroneous or affected by other error of law.

Claimant D'Agostino indicated that he thought he had filed a timely appeal. Referee Hearing Transcript, at 5. He had no other explanation as to why his appeal was filed over twelve months late. As a result, I certainly cannot say that the Referee was clearly wrong to find that claimant's self-serving, unsupported testimony was insufficient to meet his burden of showing either (a) that he did timely file an appeal or (b) excusable neglect for not having done so. Accordingly, I believe the Referee's decision must be upheld.<sup>4</sup>

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4 Before concluding, I note that the Member Representing Labor dissented, indicating that he would allow a further hearing solely on the issue of repayment. I have no doubt that the Board has discretion to allow a hearing in such circumstances as an exercise of its supervisory authority over DLT appeals, when motivated by considerations of fundamental fairness, even in circumstances such as these. Accordingly, I would not wish to be understood to be discouraging the granting of such an extension of grace by the Board, though, given this Court's limited role in DLT appeals, I believe we are without power to order such a hearing.

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, this court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact, including the question of which witnesses to believe. Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result. The Court, when reviewing a Board decision, does not have the authority to expand the record by receiving new evidence or testimony.

The scope of judicial review by the District Court is also limited by General Laws section 28-44-54 which, in pertinent part, provides:

**28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings.** – The jurisdiction of the reviewing court shall be confined to questions of law, and in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive.

Accordingly, I must regretfully conclude that the Referee's decision (accepted and adopted by the Board) that claimant did not demonstrate good cause for his late appeal from the Decision of the Director is supported by substantial evidence of record and is not clearly erroneous.

## **CONCLUSION**

Upon careful review of the record, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5),(6).

Accordingly, I recommend that the decision of the Board be AFFIRMED.

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph P. Ippolito  
MAGISTRATE

OCTOBER 12, 2011

